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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 219

ANTHONY FERNANDEZ, BURL ELTON DALGLIESH, and CARL G. PRATT, *Petitioners,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ANTHONY FERNANDEZ, BURL ELTON DALGLIESH, and CARL G. PRATT, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on March 26, 1964.

OPINION BELOW

The opinion of the court below (Appendix A, *infra*, pp. A1-A19) is reported at 329 F. 2d 899.

JURISDICTION

The judgment of the court below (Appendix B(1), *infra*, p. A20) was entered on March 26, 1964. A timely petition for rehearing was denied on April 29, 1964 (Appendix B(2), *infra*, p. A20). On May 25, 1964, Mr. Justice Douglas granted an extension of time, to and including June 28, 1964, for filing a petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether it is proper, where four defendants tried to a jury and a fifth tried to the court are jointly tried in the same proceeding for separate substantive offenses and for a conspiracy alleged to have been committed by all of whom, in a trial in which counsel for the fifth defendant participates actively, to submit the cases of the first four to a jury without permitting the jury ever to hear or learn of the testimony that the fifth defendant later gave to the court.

2. Whether, where four separate defendants are tried on several substantive counts in none of which all of them were named, as well as on a conspiracy count naming all of them that is held on appeal to have been insufficient, it was wrong as a matter of law to have denied a motion for severance at the close of the prosecution's evidence.

RULES OF CRIMINAL PROCEDURE INVOLVED

1. Rule 8, F.R. Crim. P., provides:

> **"Rule 8. Joinder of Offenses and of Defendants**
>
> **"(a) Joinder of Offenses.** Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

"**(b) Joinder of Defendants.** Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

2. Rule 14, F.R. Crim. P., provides:

"**Rule 14. Relief from Prejudicial Joinder**

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

3. Rule 23(a), F.R. Crim. P., provides:

"**Rule 23. Trial by Jury or by the Court**

"**(a) Trial by Jury.** Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

STATEMENT

There are set forth below only enough facts, taken directly from the opinion below, to place the foregoing questions in their setting.

A. The Indictments

These petitioners were convicted on various counts of two indictments charging interstate frauds in violation of 18 U.S.C. § 2314 and conspiracy in violation of 18 U.S.C. § 371, as follows:

1. *Indictment No. 16845*

(a) Petitioner Fernandez was charged in counts 2 and 3 with a substantive offense under § 2314.

(b) Petitioner Fernandez and one Delay were charged in count 4 with a substantive offense under § 2314.

(c) Petitioners Fernandez and Dalgliesh and one Dual were charged in count 5 with a substantive offense under § 2314.

(d) Petitioners Fernandez and Dalgliesh and the said Dual were charged in count 6 with a substantive offense under § 2314.

(e) Petitioners Fernandez and Pratt and the said Dual were charged in count 7 with a substantive offense under § 2314.

2. *Indictment No. 16870*

(f) Petitioners Fernandez and Pratt and the said Dual were charged in count 1 with a substantive offense under § 2314.

(g) All three petitioners together with the said Dual and the said Delay were charged with conspiracy with each other and with one Sizer, named as a co-conspirator but not as a defendant (and who died prior to trial), to commit offenses in violation of 18 U.S.C. §§ 1341, 1343, and § 2314, the conspiracy being in violation of 18 U.S.C. § 371.

B. Pretrial Motions; Trial; Further Motion for Severance

After certain counts of Indictment No. 16845 that alleged bankruptcy frauds had been severed for trial, the several defendants' further motions for a severance from each other were denied. The defendant's Delay's waiver of a jury trial was accepted, and the trial judge ordered that the trial of Delay to the court proceed simultaneously as to the Government's case with the trial of these petitioners and Dual to the jury.

Delay was tried jointly with petitioners and Dual up to the time that the last four named rested. Delay's counsel joined the other counsel in voicing objections, participated

actively in the cross-examination, engaged in vior dire examination, and offered exhibits.

At the close of the evidence, petitioners moved for a severance, asserting that there was no single conspiracy binding all of the counts and the defendants together, but at most only a series of separate conspiracies, each involving some defendants. This motion was denied, petitioners and Dual rested, and their cases were submitted to the jury.

C. Delay's Testimony Not Submitted to Jury

Thereafter, Delay, who was being tried to the court alone, took the stand and testified in his own defense. When petitioners' counsel learned of this, they moved for a mistrial on the ground that evidence was received at the trial in the absence of the jury and without notice to petitioners. This motion was denied.

Alternatively, counsel for petitioners moved that their cases be reopened to hear Delay's testimony, pointing out that they could not have called him as a witness, and urging that, now that he had voluntarily testified, his testimony should be available to them.

Inquiry by the court indicated that some of petitioners would have been content to have had Delay's testimony read to the jury, while others thought he should testify in person and be subject to cross-examination. A complication arose from the fact that petitioners' cases had been submitted to the jury the day before, and that the foreman had already reported agreement on some counts. Petitioners' counsel indicated that it would accordingly be necessary to ask the jury on voir dire if they would be able to set aside their tentative determination in connection with the consideration of Delay's testimony.

The alternative motion to reopen was denied, and thereafter a motion for new trial on the ground, *inter alia*, of

the reception of Delay's testimony in the absence of the jury, was denied.

Thereafter verdicts were rendered. Petitioner Fernandez was convicted on all counts and sentenced to 11 years and 11 months. Petitioner Dalgleish was convicted on count 6 of the first indictment and on the conspiracy count of the second, and sentenced to 3 months. Petitioner Pratt was convicted on all counts in which he was named and sentenced to 2 years and 11 months. Dual was convicted on all counts in which he was named and sentenced to 3 months. Delay was acquitted by the court. Petitioners appealed, Dual did not.

D. Rulings of the Court Below

The rulings of the court below, insofar as those are pertinent to the questions now presented, were as follows:

1. With respect to the motion for mistrial based on the reception of Delay's testimony, the court below, finding that petitioners knew when they rested that Delay had not done so, and that he was planning to proceed with his defense, held that his decision was acquiesced in by petitioners, that accordingly there was no impropriety in the reception of his evidence, and that the motion for a mistrial was properly denied.

2. With respect to the motion to reopen the case for the presentation of Delay's evidence to the jury, the court below held that there was no abuse of discretion in denying that motion. Further, treating the motion as one for a new trial on the basis of newly discovered evidence, the court below held that petitioners were not entitled to a new trial on that ground.

3. With respect to the motions for severance at the close of the evidence, and petitioners' contention that the evidence was insufficient to support the verdicts of guilty on the conspiracy count, the court below held (a) that those

convictions could not stand as to petitioners Dalgliesh and Pratt because, assuming the existence of a single overall conspiracy as alleged, it was not shown that those two knew of its existence, nature or purpose, or that, with such knowledge, they voluntarily and wilfully acted in concert with others in furtherance thereof.

The court below further held (b), with respect to petitioner Fernandez, that evidence of a single overall conspiracy was wholly lacking, and that, at most, the evidence established several diverse conspiracies. On that ground the conspiracy conviction could not stand against any of the petitioners.

None the less, the court below went on to hold, in part on the authority of *Schaffer* v. *United States*, 362 U.S. 511, that (c) there was no abuse of discretion in denying the motion for severance made at the close of the evidence.

Accordingly, the court below reversed the convictions on the conspiracy count, directing its dismissal, and in all other respects affirmed petitioners' convictions. A timely petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

We think that the manner of trial in this case, which imposed on these petitioners not only the burdens of a partial severance, so that they never had the benefit of Delay's testimony even though his counsel had participated actively in their trial, but also the burdens of a joinder, whereby the petitioners Dalgliesh and Pratt were tried jointly with other defendants with whom they were held by the court below to have had no connection whatever, so far impairs the integrity of criminal trials in district courts of the United States as to call for the exercise of this Court's supervisory powers. Indeed, we feel that the proceedings here fall within the condemnation of the court below in a case reported in the same volume of the Federal Reporter as this one, *Ramsey* v. *United States*, 329 F. 2d

432, 436: "We think the kindest thing to say is that this whole proceeding is so shot through with slipshod procedures and carelessness that appellant is entitled to a new trial."

First. It is one thing to conduct a unitary trial in which some issues are submitted to the jury and others to the court, as for instance a proceeding arising out of a maritime accident where the count for damages for negligence under the Jones Act is tried to the jury as a civil action while the count for maintenance and cure is tried to the judge as a suit in admiralty. E.g., *Jordine* v. *Walling*, 185 F. 2d 662, 671 (C.A. 3).

It is quite another to place five defendants on trial in a single criminal prosecution, which is spliced together by a conspiracy count in which all five are named, and then, after denying severance although one of the five waived trial by jury, to grant a partial severance that denies to the four jury-tried defendants the evidence of the other, where the latter had participated actively in the proceedings up to the time that the cases of the others were submitted to the jury.

The issue here concerns the integrity of a criminal trial, and that issue cannot be resolved, as the court below sought to do, by breaking it up into disparate segments. The issue here transcends questions as to whether petitioners should have contemplated Delay's going forward after they had rested, an approach that turns a trial involving the liberty of several citizens into a guessing match, a particularly hazardous forensic application of the technique of Russian roulette. Similarly, the issue involved is not met by inquiring whether there was or was not unanimity regarding the method of reopening the case. After all, such an unprecedented problem could hardly be expected to evoke a consensus of professional opinion. Nor is the issue met by asking whether the alternative motion to reopen was to be treated as a motion for new trial on the

footing of newly discovered evidence. For this was a course that petitioners did not so much as suggest. Indeed, to consider the question on that footing involves essentially the overtoppling of a straw man.

Assuming for present purposes that it was proper to combine in one trial the case against a defendant whose waiver of a jury had been accepted with the cases of four others who stood on their constitutional trial by a jury of their peers—and we wish to be free to question that assumption in the event that the present petition is granted—we submit that, at its barest minimum, such a combined trial must be treated as a single indivisible proceeding until such time as all of the proof offered by all of the parties is closed.

We have found no earlier instance of the "partial severance" practiced in this case, and we urge that this Court, by now granting review, proceed to disapprove what was done here so as to preclude any repetition thereof in the future.

Second. But petitioners were doubly prejudiced. Not only were all three denied the benefit of the testimony of Delay, whose counsel had injected himself actively into a trial that lasted 21 trial days in which 100 Government witnesses testified and some 275 exhibits were introduced, but, by being tried jointly on the strength of an unsupported conspiracy count, petitioners Dalgliesh and Pratt were necessarily involved in the trial of substantive counts with which their connection was never so much as alleged. Thus they were convicted under burden both of a partial severance as well as under the burden of a factually prejudicial joinder.

We are of course aware that *Schaffer* v. *United States*, 362 U.S. 511, did indeed sanction the submission to a jury of substantive counts against three separate defendants after the conspiracy count linking them together had been dismissed for insufficiency. We think that that decision

by a closely divided Court should be reconsidered, essentially because under its holding it is possible to try unrelated cases against different defendants together, with obvious prejudice to all. As was indicated by the dissenting opinion there (p. 524), "The loose practice of trying to bring together into one conspiracy those whose ties are at best extremely tenuous has often been criticized," citing numerous authorities. See also Jackson, J., concurring in *Krulewitch* v. *United States*, 336 U.S. 440, 445.

Those criticisms, we submit, are not met by the decision in *Schaffer*. And we believe that they can never be properly answered, we are certain that the potential unfairness inherent in prosecutions for conspiracy can never be prevented, so long as *Schaffer* stands.

To be sure, in *Schaffer* the conspiracy count had been dismissed before the case was submitted to the jury, whereas here it was not found deficient until the case reached the court of appeals. But that does not add up to a difference of substance. In our view, it is error as a matter of law to permit unrelated substantive counts involving different defendants to be submitted to a jury together if the conspiracy count whose function it is to provide the nexus between those defendants is legally insufficient. That is to say, whether such insufficiency is ruled by the district court or by the court of appeals is immaterial; the joinder is improper, as a matter of law rather than of discretion, if the catch-all conspiracy count that links the otherwise unrelated defendants together is legally insufficient to do so. Consequently no valid differentiation can be rested on the particular stage of the proceeding at which the inadequacy of the asserted connection between the parties jointly tried is authoritatively adjudicated.

It is true that adoption of the standard we urge will make it hazardous hereafter for prosecutors to require several otherwise unrelated defendants to be tried together by adding to the several substantive charges against them

an additional allegation of conspiracy that as a matter of law is incapable of proof. But such a result, which would greatly minimize the frequently recognized injustices that inhere in conspiracy prosecutions, and which would virtually eliminate the possibility of verdicts that primarily reflect guilt by association—such a result, we submit, would in consequence be in the public interest, putting all emphasis on whether particular defendants have themselves committed [redacted] offenses.

CONCLUSION

The ruling below emphasizes—and compounds—the dangers involved in trying together numerous defendants who have been ruled unrelated to each other. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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JUNE 1964.

APPENDIX A

OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,467

ANTHONY FERNANDEZ, a/k/a TONY FERNANDEZ, BURL ELTON DALGLIESH and CARL G. PRATT, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

[Mar. 26, 1964]

Appeal from the United States District Court
for the Western District of Washington
Southern Division

Before: MADDEN, Judge of the Court of Claims, HAMLEY and HAMLIN, Circuit Judges

HAMLEY, Circuit Judge:

Anthony Fernandez, Burl Elton Dalgliesh and Carl G. Pratt appeal from their convictions under various counts of two indictments charging interstate frauds in violation of 18 U.S.C. § 2314 (1958), and conspiracy in violation of 18 U.S.C. § 371 (1958).[1]

[1] There were also other defendants, one of whom was acquitted and the remainder of whom did not appeal.

Interstate frauds were charged in counts 2, 3, 4, 5, 6 and 7 of indictment No. 16845, and in count 1 of indictment No. 16870, all of these being substantive counts.[2] Conspiracy

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[2] Counts 2 and 3 of indictment No. 16845, in which only Fernandez was charged, relate to occurrences between March 21 and 27, 1958, in the course of which William E. Belcher was caused to travel from Oregon to Washington, and then to British Columbia, and five thousand dollars was transported from Oregon to Washington, pursuant to a scheme to defraud Belcher and certain banks in connection with the sale of timber near Tye, British Columbia.

Count 4, in which Fernandez and Joseph P. Delay were charged, relates to occurrences between July 8 and 15, 1958, in the course of which twenty-five thousand dollars fraudulently obtained from the Royal Bank of Canada was transported from Trail, British Columbia, to Washington and then to Oregon, in connection with Fernandez' efforts to arrange credit with that bank.

Count 5, in which Fernandez, Dalgliesh and Raymond Thomas Dual were charged, relates to occurrences between March 1 and 9, 1959, in the course of which twelve thousand dollars fraudulently obtained from Edwin Cone and Cone Lumber Co., was transported from Oregon to Washington, in connection with the sale of timber near Youcalla, Oregon.

Count 6, in which Fernandez, Dalgliesh and Dual were charged, relates to occurrences between May 1 and 14, 1959, in the course of which a check for thirty thousand dollars fraudulently obtained from the Stevenson Co-Ply Co., was transported from Washington to Oregon and five thousand dollars was transported from Oregon to Washington in connection with the sale of timber near Kelso-Longview, Washington.

Count 7, in which Fernandez, Pratt and Dual were charged, relates to occurrences between April 28 and May 3, 1961, in the course of which John Casteel was caused to travel from Oregon to Washington, then to British Columbia and back to Washington and Oregon, pursuant to a scheme to defraud him of five thousand dollars or more.

Count 1 of indictment No. 16870, in which Fernandez, Pratt and Dual were charged, relates to occurrences on or about November 1, 1960, in the course of which Dominic Tarabochia was caused to travel from Washington to Oregon pursuant to a scheme to defraud him of five thousand dollars or more in connection with the sale of timber near Deer Island, Oregon.

was charged in count 2 of indictment No. 16870.[3] Fernandez was charged and convicted on all of these counts.[4] Dalgliesh was charged on counts 5 and 6 of indictment No. 16845, and count 2 of the other indictment. He was acquitted on count 5 and convicted on the other two. Pratt was charged and convicted on count 7 of the first indictment and counts 1 and 2 of the second.

The allegations of the indictments and the evidence tending to support the convictions pertain to a series of timber and banking deals extending from February, 1958 to August, 1962. In the course of these transactions a number of businessmen, companies and banks were defrauded of large sums of money, ranging from five thousand to forty thousand dollars. The methods employed in perpetrating these frauds included the making of false representations, falsification of documents, false impersonation, and the sur-

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[3] Under this count, in which Fernandez, Dalgliesh, Pratt, Dual and Delay were charged, it was alleged that from about February 1, 1958 to the date of the return of the indictment on August 27, 1962, the persons charged conspired with each other and with other persons, including John R. Sizer, to commit offenses against the United States and to defraud the United States in the manner therein described. Four offenses were described, all relating to the stealing, converting, or taking by fraud, of property, securities or money of the value of five thousand dollars or more. These offenses were: interstate and foreign transportation of property, securities or money in violation of 18 U.S.C. § 2314; interstate travel in violation of the same statute; transmission of wire communications in interstate or foreign commerce in violation of 18 U.S.C. § 1343 (1958); and use of the mails in violation of 18 U.S.C. § 1341 (1958).

The means and methods by which this conspiracy was to be accomplished are then described in this count. While there are general allegations referring to frauds upon unidentified persons, the only identified victims and described transactions are those dealt with in the substantive counts. This is likewise true of the nine overt acts set out in this count.

[4] In sentencing Fernandez, the trial court commented that he was the "mastermind of the whole situation."

reptitious placing of documents in the luggage of intended victims. There were also overtones of possible foul play, as two intended victims of fraud, on separate occasions, suffered mysterious accidents and received resulting injuries, one in the wilds of British Columbia and the other in timber land east of Longview, Washington, in each case while in the company or recent company of Fernandez.

Appellants first argue that the trial court erred in refusing to submit the testimony of a co-defendant, Joseph Delay, to the jury.[5] This has reference to the fact that after appellants and the other defendants except Delay had rested, and their cases had been submitted to the jury, Delay, who was being tried to the court without a jury, took the witness stand and testified in his own defense.

When counsel for appellants learned of this, at a time when the jury was still out, they moved for a mistrial on the ground that evidence was received at the trial in the absence of the jury and without notice to appellants. An additional ground advanced in support of this motion was that the Government, although knowing Delay to be innocent, had deliberately indicted him so that he could not be called as a witness on behalf of appellants. The motion was denied.

Alternatively, counsel for appellants moved that appellants' cases be reopened to hear Delay's testimony. Pointing out that they could not have called Delay as a witness, appellants argued that now that Delay had voluntarily testified, his testimony should be available to them.

Upon inquiry by the court it became evident that some of appellants' counsel would have been content to have Delay's testimony read to the jury, while others thought Delay should testify in person before the jury and be

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[5] As indicated in notes 2 and 3, Delay was charged with Fernandez on count 4 of indictment No. 16845, and with all three appellants, and others, in count 2 of indictment No. 16870.

subject to cross examination. Another complication arose from the fact that the cases against appellants had been submitted to the jury the previous day and that the foreman of the jury had reported late that evening that the jury had come to a decision on some of the counts. Counsel for appellants indicated that, in view of this circumstance, it would be necessary to examine the jury on voir dire to determine if they would be able to set aside their tentative determinations in connection with the consideration of Delay's testimony. This alternative motion was denied.

After the convictions were obtained appellants moved for a new trial, urging as one ground, the reception of Delay's testimony in the absence of the jury. This motion was also denied.

The arguments advanced by appellants with regard to Delay's testimony bring into question the correctness of the court's rulings in denying all of these motions.

Delay was tried jointly with appellants and the other defendants up to the time that appellants and the other defendants rested. His counsel joined the other counsel in voicing objections, participated actively in the cross examination, engaged in voir dire examination, and offered exhibits. Nevertheless, and notwithstanding the fact that the motions of Delay and appellants for complete severance, made before the trial and renewed at the end of the evidence had been denied, there was a severance in the limited sense that Delay's case was to be submitted to a different fact-finder, the judge instead of the jury.[6]

This distinction was preserved throughout the trial. At the outset it was made clear to all counsel that Delay was being tried to the court. The jury was also so instructed.

[6] After his motions for a completely separate trial were denied, Delay filed a waiver of trial by jury. At the same time his counsel requested that Delay's case be heard at the same time as those of the other defendants.

Opening statements were made at the beginning of the trial on behalf of each appellant, but Delay was permitted to reserve his opening statement. Appellants rested without putting on any case knowing that Delay, who had not up to then put on any case, was not resting.

There were other circumstances indicating that counsel for appellants were aware that Delay would go forward with a defense after appellants' cases had been su' mitted to the jury. During the course of the trial counsel for appellant Pratt objected to the reception of evidence concerning an interview which a Government agent had had with Delay, on the ground that "this should be reserved for a later time since it isn't relevant to any inquiry that the jury will have." During a colloquy between court and counsel as to the time counsel for appellants would require for closing argument, and at other times, the court made it clear that following the submission of appellants' cases to the jury, Delay would present his defense.

The record does not indicate that appellants or their counsel were aware that Delay would personally testify in his own defense. But they were sufficiently on notice so that they should have inquired of Delay as to his plans in this regard, if his testimony was deemed valuable to them. Despite the close cooperation between counsel for appellants and for Delay throughout the trial, apparently no such inquiry was made. Under these circumstances, appellants are hardly in a position to claim surprise.

Appellants do not, on this appeal, renew the charge that the Government, knowing Delay to be innocent, deliberately indicted him so that he could not be called as a witness on behalf of appellants. Nor is there anything in the record to substantiate such a serious accusation. While Delay was acquitted by the judge, he was vigorously prosecuted by the United States Attorney.

Appellants have never charged, nor would the record support such a charge, the the United States deliberately

arranged to postpone Delay's testimony until after appellants had rested, so that the jury would not hear it. As before noted, when appellants rested they knew that Delay had not, and that he planned to go forward with his defense. There is no reason to believe that, had they chosen to do so, appellants could not have withheld resting their cases until Delay had completed his. The decision as to when Delay would put on his defense was made not by the Government, but by Delay, and was acquiesced in by appellants.

Therefore, finding no impropriety in the way in which Delay's testimony was received, we hold that the trial could did not err in denying the motion for a mistrial.

The motion to reopen for the purpose of receiving Delay's testimony, made after the jury had appellants' cases already under submission, rested within the sound discretion of the trial court. See *Wolcher v. United States*, 9 Cir., 218 F.2d 505, 509. Considering appellants' lack of diligence in previously ascertaining whether Delay would testify, the fact that the jury had already reached tentative decisions on some of the counts, and the improbability that Delay's testimony would have been helpful to appellants (to be discussed below), we do not believe that the trial court abused its discretion in denying that motion.

Appellants at no time moved for a new trial on the ground of newly-discovered evidence and, in fact, expressly stated in arguing their post-trial motion for a new trial, that the motion was not based on the theory of newly-discovered evidence. We will nevertheless assume that one of appellants' motions could be so regarded, and will consider whether appellants were entitled to a new trial on this ground.

Delay testified concerning his limited participation, as attorney for Fernandez, in the Belcher transaction dealt with in counts 2 and 3 of indictment No. 16845, the Casteel transaction dealt with in count 7 of that indictment, and

the Royal Bank of Canada transaction, dealt with in count 4 of that indictment. All of these matters were also involved in the conspiracy charge set out in count 2 of indictment No. 16870. While Delay's testimony tended to show that his participation in these transactions was innocuous, it did not tend to show that the transactions themselves did not occur, or were innocent in character, or that any of the appellants were not criminally involved therein.[7] Delay testified that he did not know about the general circumstances surrounding any of these transactions,[8] and

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[7] As heretofore noted, appellant Dalgliesh was not charged under any of the substantive counts concerning which Delay testified, but was charged under the conspiracy count. Appellant Pratt was charged under one substantive count which Delay dealt with in his testimony (count 7 of indictment No. 16845) and the conspiracy count.

[8] As to this, Delay testified in part:

"Q. Now, Mr. Delay, did you know of the circumstances at any time surrounding the issuance of that check? A. No, sir, not until subsequent to this indictment when I investigated the matter with you and Mr. Bantz, my attorneys. Q. Do you know any of the circumstances surrounding the Belcher matter as far as what transpired as far as phone calls and the US National Bank and the Gresham Bank participation in that until the time of trial? A. No sir. Q. Now, did you know anything about the matter between Fernandez and Casteel until the time of trial? A. No sir. Q. Now, at any time did Mr. Fernandez tell you in any way or in any manner whatsoever what the goings on were between he [sic] and any of these parties? A. No sir, he did not. Q. Relative to that did you ever have any knoledge of actually what transpired between Mr. Fernandez and any of these parties? A. No sir."

* * * * *

"Q. Now, Mr. Delay, until you were able to obtain your files from the Trustee in Bankruptcy, and until we were able to investigate this, you had no knowledge of the circumstances surrounding any of these transactions that have been testified to in court here, is that right? A. That is correct. Yes."

also stated that Fernandez had several other attorneys.[9]

In order to justify a new trial on the ground of newly-discovered evidence the new evidence must be such that on a new trial it would probably produce an acquittal. See *Fiorito v. United States*, 9 Cir., 265 F.2d 658, 659. In our opinion the testimony given by Delay was not such that, if heard by the jury, it would have been likely to lead to the acquittal of any of the appellants on any of the charges against them.

There was also, as previously pointed out, a lack of diligence by appellants, and this alone was enough to warrant denial of such a motion. See *Gallegos v. United States*, 9 Cir., 295 F.2d 879. A motion for a new trial on the ground of newly-discovered evidence is addressed to the sound discretion of the trial court. See *Morgan v. United States*, 9 Cir., 301 F.2d 272, 275. The trial court did not abuse that discretion in denying the motion if, indeed, any such motion was made.

Appellants next argue that the trial court erred in denying appellants' respective motions for severance made at the end of the evidence.

Appellants contend that it was then apparent that there was no single conspiracy possible binding all these counts and defendants together, but that there was, at most, only a series of separate conspiracies, each involving some defendants. Appellants assert that they were seriously prejudiced by the reception of evidence bearing upon

[9] Delay was cross examined at length concerning his participation in these transactions and nothing developed which was in the least exculpatory so far as appellants were concerned. But had Delay testified before the jury prior to the time appellants rested, his cross examination would not have been limited to his own participation and could well have proved damaging to appellants. Nor is it unlikely that the jury would then draw an invidious comparison between Delay, who testified voluntarily, and appellants who neither testified nor offered any other defense testimony.

matters which, to a large extent, did not concern one or the other of them.

While this argument is framed as an attack upon the failure to grant severance, the substance of the argument also includes a challenge to the sufficiency of the evidence to support the verdicts of guilty on the conspiracy count.

The evidence tending to support the convictions under the conspiracy count is summarized in detail in the Government's answering brief herein.[10] It appears therefrom that the only evidence connecting Dalgliesh with any of the substantive counts, or the conspiracy count, is that relating to the transactions referred to in count 5 of indictment No. 16845, of which charge he was acquitted, and that relating to the transaction referred to in count 6 of that indictment, of which charge he was convicted.

It also appears from the Government's summary that the only evidence connecting Pratt with any of the substantive counts, or the conspiracy count, is that relating to the transactions referred to in counts 5 and 7 of indictment No. 16845, and count 1 of indictment No. 16870. Pratt was charged and convicted on counts 7 and 1.[11]

As to the other substantive counts, the evidence not only fails to connect Dalgliesh and Pratt as direct participants, but fails to show that either of them knew of any of those transactions, or were aware of any conspiracy or conspiracies involving them, if any, or the nature and purpose of such conspiracy or conspiracies.

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[10] The allegations of the conspiracy count are summarized in note 3.

[11] In its brief the Government also calls attention to what it asserts is evidence connecting Pratt with counts 2 and 3 of indictment No. 16845. But this so-called evidence, to the effect that Pratt was to write a performance bond for the victim named in those two counts, consisted of statements by Fernandez in a deposition given in a civil suit which was not introduced in evidence in this criminal case.

It therefore appears that Dalgliesh may have been involved in a conspiracy relating to the matters dealt with in count 6 of indictment No. 16845. Similarly, Pratt may have been involved in conspiracies, separate from that referred to above, relating to the matters dealt with in counts 5 and 7 of that indictment and count 1 of the indictment in No. 16870. But, assuming that there was substantial evidence showing the existence of a single, over-all conspiracy of the kind alleged in the indictment, it was not shown that Dalgliesh or Pratt knew of its existence, nature or purpose and that, with such knowledge, they voluntarily and wilfully acted in concert with others in the furtherance of that conspiracy.[12]

Accordingly, the convictions on the conspiracy count cannot stand as to Dalgliesh and Pratt. See *Leyvas v. United States*, 9 Cir., 264 F.2d 272, 274.

As for Fernandez, there is evidence connecting him with all of the substantive counts. And to the extent that there was a conspiracy, or were conspiracies, between two or more persons in connection with these and similar transactions,[13] he, as the so-called "mastermind," was a direct participant therein, knew of any such conspiracy or conspiracies, and was aware of their nature and purpose.

But there is nevertheless wholly lacking any evidence showing that there was a single over-all conspiracy to

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[12] It is recognized that one may be convicted as a co-conspirator though he joined the conspiracy after its inception, his part was minor; he was not aware of all of the details of the conspiracy, he did not participate in an alleged overt act, and he did not know the part other conspirators were to play, or even who all of them were. *Fernandez v. United States*, 9 Cir., 300 F.2d 114; *Chavez v. United States*, 9 Cir., 275 F.2d 813.

[13] In the detailed summary of evidence contained in the Government's answering brief, reference is made to several transactions other than, but generally similar to those described in the substantive counts, in which Fernandez was involved.

engage in these separate and distinct transactions which occurred at different times and places and involved varying persons and methods of operation. At most, the evidence establishes several diverse conspiracies radiating from Fernandez, in all of which he participated, and in one or two of which Dalgliesh and Pratt participated. This being true, the conviction on the conspiracy count cannot stand even as to Fernandez and, on this additional ground, it cannot stand as to Dalgliesh and Pratt. See *Leyvas v. United States, supra* at 273.

For the reasons stated above, the convictions of all three appellants on the conspiracy count must be set aside, and judgments of acquittal entered thereon.

This brings us to the asserted error of the trial court in denying appellants' motions for severance, made at the end of the evidence.

In view of the conspiracy count, wherein all of the defendants were alleged to have participated in the same series of acts or transactions constituting the offenses described in the substantive counts, the initial joinder of offenses and defendants in the two indictments was authorized under Rule 8(b), Federal Rules of Criminal Procedure. See *Schaffer v. United States*, 362 U.S. 511, 513.

Nevertheless, where such a joinder is proper under Rule 8(b), a defendant prejudiced thereby may, under Rule 14, Federal Rules of Criminal Procedure, move for an order requiring separate trial of counts, severing defendants, or providing whatever other relief justice requires. Appellants so moved, prior to trial, but being unable to satisfy the trial court at that stage of the proceedings that they would be prejudiced by the joinder of offenses and defendants, these motions were denied.

Appellants do not now appear to complain of this action. But they argue, in effect, that when they renewed their motions for severance after the evidence was in, it then being shown by the evidence that there was no single over-

all conspiracy, the trial court should have granted the motions. It is thus asserted, in effect, that the lack of substantial evidence supporting the conspiracy count retroactively establishes misjoinder as to them, or at least establishes prejudice entitling them to severance even if there was not a technical misjoinder.

Where the initial joinder is proper, subsequent severance is controlled by Rule 14, which provides for separate trials where ". . . it appears that a defendant . . . is prejudiced by such joinder for trial . . . ." *Schaffer v. United States*, *supra*, at 515-516. Absent prejudice, the failure of the Government to produce sufficient evidence to prove a conspiracy count which made possible the joinder, is not a ground for a mistrial and a severance. *United States v. O'Brien*, 7 Cir., 319 F.2d 437, 439; *United States v. Kaufman*, 2 Cir., 311 F.2d 695, 698.

The granting of severance because of possible prejudice, pursuant to Rule 14, rests within the sound discretion of the trial court. *Opper v. United States*, 348 U.S. 84, 95. The specific question before us is whether in denying appellants' motions for severance made after the close of the evidence, the court abused its discretion.

Fernandez, of course, was involved in all seven of the substantive counts. While Dalgliesh and Pratt were each involved in only two of the substantive counts, the evidence as to each was not particularly complex and was sufficiently compartmentalized so that the jury would have no unusual difficulty in keeping the evidence as to each separate in their own thinking. The best indication of this is that the jury did not indiscriminately convict all defendants on all counts on which they were charged, but acquitted on counts where the evidence was weak.[14] Most of the evi-

[14] Fernandez, the only defendant named in count 1 of indictment No. 16845, was found not guilty on that count. On count 5 of that indictment the jury found Fernandez and Dual guilty, and Dalgliesh not guilty.

dence was directly related to the substantive counts as distinguished from the conspiracy count. When evidence was received only as to certain defendants or offenses, the jury was so instructed. Each substantive count was precise and detailed as to time, place, persons involved and nature of the offense.[15]

In view of the circumstances referred to above, considered in the light of the whole record before us, we are of the opinion that the trial court did not abuse its discretion in denying the motions for severance made at the close of the evidence.

Appellants next argue that the trial court erred in admitting irrelevant and unduly prejudicial evidence.

In connection with the Belcher transaction dealt with in counts 2 and 3 of indictment No. 16845, there was testimony that a bank officer had received several telephone calls from a person who identified himself as Belcher. In connection with Stevenson Co-Ply Co. transaction, dealt with in count 6 of that indictment, there was testimony that a prospective purchaser of timber received a telephone call from a person who identified himself as Rotschy, a timber cruiser, whose cruise of certain timber the prospective purchaser was interested in obtaining.

The Government claimed that all of these telephone calls were actually made by Fernandez, who misrepresented himself as Belcher and Rotschy in an effort to deceive the persons being called. Among the items of evidence submitted by the Government bearing upon this matter was the testimony of the bookkeeper formerly employed by Fernandez, received over timely and appropriate objections, that on other occasions having nothing to do with

[15] At the beginning of the trial the court summarized the various counts. Counsel for the Government read them in their entireties to the jury. The jury had photocopies of the counts with them in the jury room at the time of their deliberations.

any of the transactions dealt with in these indictments, she had heard Fernandez misrepresent himself as someone else over the telephone. There was no testimony indicating that the conduct thus revealed was unlawful in any respect. The witness did not testify as to the purpose of these telephone calls but, as to one of them, the inference was left that Fernandez was attempting to obtain favorable newspaper publicity.

In connection with the Casteel transaction dealt with in count 7 of indictment No. 16845, there was testimony that Casteel had not signed a deed to certain timber land owned by him, although his signature appeared thereon. The Government claimed that either Casteel signed the document upon the representation that it was some other kind of paper, or that his signature had been fraudulently placed thereon without Casteel's knowledge, Fernandez being the guilty person, whichever way the fraud was accomplished.

Among the items of evidence submitted by the Government bearing upon this matter was further testimony from the same bookkeeper referred to above. She testified, over timely and appropriate objection, that Fernandez had a duplicating machine on which he had added a signature of a timber cruiser to an unsigned timber cruise by joining together two pieces of paper with scotch tape and running them through the machine. The witness did not know whether the person whose signature had been added had authorized this to be done.

As also bearing upon this matter, the Government produced testimony, received over timely and appropriate objections, concerning several other and unrelated transactions in which, according to the witnesses, unauthorized signatures and words were added to instruments after Fernandez obtained possession of them.

In objecting to the admission of this evidence, appellants invoked the general rule that when a defendant is on trial for a specific offense, evidence of a distinct offense un-

connected with that charged in the indictment is not admissible. While appellants concede that there are well-recognized exceptions to that rule, they argue that none of those exceptions are applicable here.

Both the rule and its principal exceptions are stated in *Stewart v. United States*, 9 Cir., 311 F.2d 109, 112.[16] The rule, including its exceptions, is usually regarded as one of relevance, *Lisenba v. California*, 314 U.S. 219, 227, although in actuality it represents an accommodation between that rule,[17] and the rule precluding resort to evidence of a defendant's evil character to establish a probability of his guilt.[18]

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[16] In *Stewart*, at page 112, the court quoted with approval, this statement of the exceptions to this rule, as set out in *Bracey v. United States*, D.C. Cir., 142 F.2d 85, 87:

> "However, there are many well established exceptions to this rule, raised by the special circumstances of particular cases; to the end that all relevant facts and circumstances tending to establish any of the constituent elements of the crime of which the defendant is accused may be made to appear. Thus, evidence of other criminal acts has been held admissible by this court when they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged. Such evidence is admissible if it so related to or connected with the crime charged as to establish a common scheme or purpose so associated that proof of one tends to prove the other, or if both are connected with a single purpose and in pursuance of a single object; as well as to establish identity, guilty knowledge, intent and motive."

[17] As the Supreme Court said in *Abel v. United States*, 362 U.S. 217, 239: "Good reason must be shown for prohibiting the Government from using relevant, otherwise admissible, evidence."

[18] See *Michelson v. United States*, 335 U.S. 469, 475-476, for a good statement of this rule. As the court there points out, such evidence is rejected, not because it is irrelevant, but because its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Relevant evidence which tends to prove a material fact in the case on trial is admissible even though it incidentally shows that the accused committed another offense at a different time and place. *O'Dell v. United States*, 10 Cir., 251 F.2d 704, 707; 1 Wigmore on Evidence, 3 ed., § 216, pp. 712-718. But because evidence as to other offenses is subject to misuse by the jury, the relevance of such evidense to prove a material fact is to be restrictively determined. The exceptions to the rule against admitting evidence of other offenses thus represents court-determined instances in which relevance has been held sufficient to warrant admissibility.[19]

In our opinion, the testimony concerning the other telephone calls by Fernandez, in which he had impersonated others, demonstrated his familiarity with and willingness to use that *modus operandi* and therefore tended to identify him as the person who had impersonated others in telephone calls to the bank official and the prospective purchaser. Likewise, the testimony concerning his previous insertion of a signature in a document by use of a duplicating machine tended to show how the signature of Casteel could have been added to a deed, and that Fernandez was the one who did it. The testimony of others that documents they had delivered to Fernandez were later found to contain unauthorized signatures and words tended to show that Fernandez had developed a technique for doing this, thereby providing support for the claim that Casteel had been a victim of that technique.

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[19] As the court stated in *Harper v. United States*, D.C. Cir., 239 F.2d 945, 946:

> ". . . the rule is that evidence of other offenses is admissible when substantially relevant to the offense charged; inadmissible when its relevance is insignificant; and, in borderline cases, admissible when its relevance outweighs the undue prejudice that may flow from it, but otherwise inadmissible. Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 Harv. L. Rev. 988 (1938); Lacy, Admissibility of Evidence of Crimes not Charged in the Indictment, 31 Ore. L. Rev. 267 (1952)."

The questioned testimony was therefore relevant and, in our view, its relevance outweighs the prejudice flowing from the fact that it shows misconduct not related to the transactions involved in this case.

At the close of the case the trial court gave a general instruction advising the jury that they were not to accept evidence of other similar acts as any evidence that any defendant committed any act charged in the indictment, but that if the jury found from other evidence than an accused had committed an act charged, then the evidence of other acts could be considered in determining "identity," "association," "guilty knowledge or state of mind," or "intent."

The evidence in question was not admissible to prove guilty knowledge, state of mind or intent, because it had no relevance in that direction, being wholly colorless with regard to the intent with which the charged acts were committed. But the instruction could not have been prejudicial in this respect because the jury was told that they could not consider the evidence at all unless the acts were independently proved. If the fact that Fernandez made telephone calls to the bank officer and prospective purchaser, impersonating others, was independently proved, an improper intent was likewise independently proved, because the nature of the act involved such an intent. This is likewise true with regard to the independent proof of the alteration of documents.

While we have held that the evidence in question was admissible because of its tendency to prove that Fernandez committed the charged acts, the trial court instructed that it could not be considered for that purpose.[20] But appellants were not prejudiced by that instruction as it

[20] The court did instruct that such evidence could be used to establish "identity" or "association," which would be relevant only in proving that the acts were committed. But this part of the instruction was in effect countermanded by the introductory instruction that the evidence could not be used in determining whether the defendants had committed the acts charged.

gave them the advantage of a ruling to which they were not entitled. Moreover, since we may assume that the jury abided by the instructions given, it is likely that the evidence of other offenses was not considered by the jury for any purpose—not to prove the acts because the court said it could not, and not to prove intent because this was independently proved.

We therefore conclude that the reception of the evidence in question did not constitute reversible error.

The trial court did not err in instructing the jury with regard to the substantive counts concerning the meaning and application of the term "principal" as used in 18 U.S.C. § 2 (1958).[21]

We need not decide whether there was error with regard to the instructions concerning conspiracy, since we have held that the evidence is insufficient to support the convictions on that count.

Nor is it necessary to decide whether, as to count 1 of indictment No. 16870, involving a scheme to defraud Tarabochia, there was sufficient evidence to support the jury finding that property of the value of five thousand dollars was stolen, converted or taken, this being an essential element of the crime defined in the first paragraph of 18 U.S.C. § 2314. Fernandez and Pratt were convicted on that count, but their respective sentences thereon were made concurrent with sentences imposed upon them on other counts which we have upheld.[22]

The convictions of appellants on count 2 of indictment No. 16870 are reversed and, as to them, dismissal of this count of the indictment is directed. The convictions of the appellants on all of the substantive counts are affirmed.

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[21] See *Nye & Nissen v. United States*, 336 U.S. 613; *Toles v. United States*, 9 Cir., 308 F.2d 590; *Aaronson v. United States*, 4 Cir., 175 F.2d 41; *Barsky v. United States*, D.C. Cir., 167 F.2d 241, 252.

[22] See *Lawn v. United States*, 355 U.S. 339, 359; *Franklin Brothers v. United States*, 9 Cir., ... F.2d ....

APPENDIX B

JUDGMENTS BELOW

(1) Judgment

[Caption omitted.]

APPEAL from the United States District Court for the Western District of Washington, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause as to Count two of indictment No. 16870 as to appellant be and hereby is reversed and that said judgment on all of the substantive counts be and hereby is affirmed as to all appellants.
Filed and entered March 26, 1964.

(2) Order Denying Rehearing

[Caption omitted.]

Filed Apr 29 1964

Before: MADDEN, Judge of the Court of Claims, HAMLEY and HAMLIN, Circuit Judges

The petition for rehearing is denied.

/s/ J. WARREN MADDEN
Judge, Court of Claims

/s/ FREDERICK G. HAMLEY
/s/ O. D. HAMLIN
United States Circuit Judges

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 219

ANTHONY FERNANDEZ, BURL ELTON DALGLIESH, and CARL G. PRATT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 329 F. 2d 899.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1964 (Pet. App. 20). A petition for rehearing was denied on April 29, 1964 (Pet. App. 20). On May 25, 1964, Mr. Justice Douglas extended

the time for filing a petition for a writ of certiorari to and including June 28, 1964. The petition for a writ of certiorari was filed on June 26, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a case where four defendants were being tried jointly before a jury, the trial court abused its discretion in refusing to reopen their cases to hear the testimony of a fifth defendant being tried to the court without a jury, where the jury had retired, had already reached a decision on some counts, and where the four co-defendants had rested their defenses without making inquiry as to whether the fifth defendant would testify.

2. Whether, where the court of appeals upsets a conviction of four defendants on a conspiracy count, there must, as a matter of law, be a new trial on substantive counts on the ground of improper joinder.

RULES INVOLVED

Rule 8 of the Federal Rules of Criminal Procedure provides:

> (a) *Joinder of Offenses.*
>
> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more

acts or transactions connected together or constituting parts of a common scheme or plan.

(b) *Joinder of Defendants.*

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provides:

Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

1. The three petitioners, together with Joseph P. Delay and Raymond Dual, were tried under two indictments returned in the Western District of Washington charging violations of 18 U.S.C. 2314 and conspiracy (R. 1-8, 38-42).[1] The sufficiency of the

[1] The record on file with the Clerk is in eleven volumes. The first volume containing copies of papers filed below is designated herein as "R." The other ten volumes containing the typewritten transcript of the evidence are separately paginated and are designated as "Tr."

evidence is not challenged in this Court and is therefore summarized only briefly as a background for the contentions raised.

The case, centering around petitioner Fernandez, involved fraud in the sale of timber and in banking transactions tied to timber operations.

(a) Under Counts 2 and 3, in which petitioner Fernandez alone was charged and convicted,[2] the evidence showed that on March 21, 1958, Fernandez and William E. Belcher left from Portland, Oregon, for Tye, British Columbia, to inspect timber which Fernandez was trying to sell (Tr. 143-153, 761-763). Fernandez had told his bank that he expected Belcher to transfer $40,000 by wire from Belcher's bank account to his account to complete a transaction (Tr. 419-422). On March 22, a person who identified himself as Belcher caused $40,000 to be transferred from Belcher's account to Fernandez (Tr. 570-588, 532-533). On March 23, Belcher and Fernandez attempted to inspect timber at Tye (Tr. 153-165) and on March 24, Belcher was found dazed beside a railroad track with head wounds, unaware of the cause of his injury (Tr. 166-173, 238, 245-250, 631-632). Belcher then learned of the unauthorized transfer from his bank account (Tr. 210). Three documents that he had never previously seen—a $40,000 receipt, a logging contract and a memorandum agreement—were in his suitcase (Tr. 176-177, 636, 797, 977). Co-defendant Delay, a lawyer, had sent a copy of the

[2] Fernandez was acquitted by the jury on Count 1, which charged that he caused William E. Belcher to travel in interstate commerce on March 3, 1958.

logging agreement to another attorney, purportedly at the request of Belcher (Tr. 983-989, 1004).

(b) Under Count 4, in which Fernandez and Delay were charged, it was shown that Fernandez obtained a check for $25,000 from the Royal Bank of Canada on false representations that the Portland Trust Company would guaranty the loan (Tr. 1142-1177). Fernandez was convicted on this count; Delay was acquitted.

(c) Under Count 5, in which Fernandez, Dual and Dalgliesh were named, it was shown that in March, 1959, Fernandez and Dual, representing the D & M Contracting Co., exhibited timber in Oregon to Edwin Cone of the Cone Lumber Company, showing a government tag at the site marking the particular tract and also a report of the Starr Cruising Company describing the timber on this tract. Cone gave Fernandez $61,000 for the tract (Tr. 1466-1475, 1514, 1533, 1542, 1546-1547), and later discovered that a different tract was conveyed to his company. When he demanded his money back, Fernandez refused his request, telling him that he had been confused and the money had been invested and was no longer available (Tr. 1477-1483). Ultimately Cone was able to recover $30,000 (Tr. 1496-1499). Petitioner Pratt notarized the deeds by which D & M Contracting Co. acquired and conveyed the property (Tr. 1475, 1569-1571, 1601). Fernandez and Dual were convicted on this count; Dalgliesh was acquitted.

(d) Count 6 charged petitioners Fernandez, Dalgliesh, and Dual, and all three were convicted. The evidence showed that shortly before May, 1959, Dal-

gliesh took a buyer of the Stevenson Co-Ply Company to 40 acres of timber near Kelso, Washington, said to be owned by Dual, and pointed out to him the corners of the tract and the government tag at the site (Tr. 1653, 1657, 1723). Dalgliesh gave him a cruise report of the Starr Cruising Company, the company which he owned. When the buyer asked to see other cruises (reports concerning the grade and amount of timber on the tract), Dalgliesh handed him what purported to be another cruise report and arranged for a telephone conversation with a person falsely identified as another cruiser (Tr. 1652, 1657-1664, 2037). On May 1, 1959, the Stevenson Co-Ply Company paid Dual $30,000 for the tract (Tr. 1732-1740). The description of the property purchased was the same on the deed of conveyance and on the Starr report (Tr. 1712-1713, 1725). Later the company found that it actually had purchased barren property which had been logged. When it notified Dual, he claimed that he did not know anything was wrong and declared that the money he received had been either invested or lost (Tr. 1679, 1741). Dual, with Dalgliesh's assistance, had acquired the 40 acres shortly before the sale to Stevenson (Tr. 1780-1804). There was evidence to indicate that Fernandez had received some of the proceeds of the sale (Tr. 1822-1836).

(e) Under count 7, Fernandez, Pratt and Dual were charged and all three were convicted. Claiming to represent a New York Syndicate, they obtained an option to buy timber from John L. Casteel (Tr. 2290-2306). On April 28, 1961, Casteel went on a trip with

Fernandez for the purpose of examining timber near Nelson, British Columbia, returning to Spokane on May 1 (Tr. 2307-2320). The next morning they had breakfast with Delay, and discussed the Canadian timber (Tr. 2321-2323). On May 3, 1961, after a timber inspection trip near Longview, Washington, with Casteel, Fernandez jumped out of the vehicle he was driving, saying he had lost control. The vehicle dropped over a 60-foot bank, but was stopped by a log from a complete drop (Tr. 2333-2335). The next day Casteel, who had been injured, saw for the first time papers dated April 28, 1961, purporting to transfer his timber to the Forest Timber Product Company for assignments of timber options. The signature of Casteel, notarized by Pratt, was on the deed; the assignments were also notarized by Pratt (Tr. 2337-2358). On May 2, 1961, Delay made an offer to buy the Canada timber in Casteel's behalf, which the latter said was not authorized (Tr. 2358-2360).

(f) Count 1 of the second indictment named Fernandez, Pratt and Dual, who were all convicted. In November, 1960, Fernandez obtained a deed to timber on the representation that the document was a contract to remove timber. This deed was notarized by Pratt (Tr. 1962-1982, 1998-2008, 2160-2172). Pratt and Dual tried to sell this timber to Dominic Tarabochia for $3,500 or $4,000, giving him a false cruise sheet. They later tried to sell him some equipment (Tr. 2058-2076), but Tarabochia did not purchase either the property or the equipment (Tr. 2078-2085).

(g) The second count of the second indictment charged a conspiracy among all the defendants to perpetrate all of these frauds. Petitioners were convicted on this count but the court of appeals reversed, finding that the evidence did not show a single over-all conspiracy.[4]

2. Prior to trial, petitioners Fernandez, Pratt and Dalgliesh and defendant Dual filed motions for "an order of segregation of defendants and for separate trials of unrelated offenses" (R. 29-33, 55-56). More particularly, they contended that particular counts should be tried separately as being unrelated to the remaining counts, arguing that the proof would fail to show a single conspiracy.[4] These motions were denied. Defendant Delay then filed a waiver of his right to be tried by jury, requesting that his case be heard by the court at the same time as the other defendants were tried by the jury. He asserted that "the matters for Mr. Delay are more legal in nature and the facts probably are not much in dispute." The government consented to this waiver and it was ap-

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Fernandez was sentenced to imprisonment for a total of eleven years and eleven months. (R. 76-78). Dalgliesh was sentenced to imprisonment for a period of three months and a sentence of 27 months was suspended except for the period of imprisonment (R. 81-82). Pratt was sentenced to imprisonment for a period of two years and eleven months (R. 79-80). Delay, who waived trial by jury, was acquitted by the court on all counts in which he was charged (R. 71-72).

[4] The court severed counts charging bankruptcy frauds (R. 50-51).

proved by the court (R. 58-59).[7] Petitioners did not oppose Delay's request. Petitioners' motions for separate trials were renewed at the close of the government's case (Tr. 3169-3170).

The government closed its case on Thursday, December 20, 1962. At that time counsel for Fernandez suggested that if the government would restrict the time needed for its summation, petitioners would rest their case immediately so that the jury would get the case before the weekend. When the government agreed, petitioners rested their case without offering any testimony and announced they were ready to proceed with final arguments. Delay, however, who was being tried by the court at the same time without a jury, did not rest (Tr. 3171-3174, 3187-3189).[8] He had not as yet made or waived the opening statement which he had reserved at the beginning of the case (Tr. 25). The next day the court adjourned the case until December 26 after all parties consented to the request of the jury for a Christmas recess. The court indicated that it might allow petitioners to reopen their case after the recess if they so requested (Tr. 3203-3208). Following the recess, on December 26, final arguments were made to the jury (Tr. 3213) and on December 27, the court charged the jury (Tr. 3215), advising them in its instructions that Delay

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[7] Delay had previously moved for a separate trial on the ground that publicity about defendant Reubel Lenske would prejudice him (R. 52-54).

[8] The court had asked Delay's attorney if he planned to go forward with his case on December 26 but it is not clear whether counsel for Pratt was in the courtroom at the time (Tr. 3184, 3187).

had elected to be tried before the court (Tr. 3215-3216). The case against petitioners was then submitted to the jury and the case against Delay was continued to further order (Tr. 3269). That evening the jury reported that it had reached a decision on some counts (Tr. 3270). On the following day, while the jury was deliberating, Delay testified in his own defense before the court concerning his relationship with Fernandez and his connection with Belcher (Tr. 3273-3277, 3286-3287), Casteel (Tr. 3277-3281), and the Royal Bank of Canada (Tr. 3281-3284), and was cross-examined by the government (Tr. 3287-3375). Shortly before the conclusion of his examination, petitioners moved for a mistrial on the ground that "evidence in the trial was given in the absence of the jury and without notice to the defendants bearing on the issues that were set for trial." Alternatively they requested that the jury be returned to hear Delay's testimony (Tr. 3375-3376). Their motion was denied by the court. Following the return of the jury verdict, the court found Delay not guilty.

ARGUMENT

1. Petitioners were not compelled over objection to have their case presented with a defendant who had waived jury trial. Petitioners did not oppose Delay's request that his case be tried by the court at the same time as the jury heard the case against the other defendants. In the trial court, they did not urge Delay's waiver of jury trial as a ground for a separate trial nor did they otherwise voice any objection to this procedure at that time. If petitioners had objected, the

court might in response have required either that Delay's case be submitted to the jury along with that of the other defendants, or that it be severed. Cf. *Fitzgerald* v. *United States Lines*, 374 U. S. 16. The procedure followed was neither burdensome nor confusing. This is demonstrated by the fact that during the trial petitioners did not complain about the conduct of Delay's counsel in making objections and cross-examining witnesses. Indeed a reading of the record creates the impression that petitioners' attorneys welcomed his assistance and with the exception of a statement admitted only against Delay, the government's case against petitioners would have been substantially similar if Delay had not been a party.[7]

The only actual prejudice claimed is that petitioners did not have the benefit of Delay's testimony, which took place after their cases had been submitted to the jury. But petitioners themselves showed no timely interest on this score. Instead of suggesting or indicating that they desired to have an opportunity to present Delay's testimony to the jury, they announced that they were ready for final argument before Delay had rested his case. Petitioners could have made inquiry of Delay's counsel as to whether Delay was to testify and could have refused to close until they were advised as to what Delay planned to do. Instead it

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[7] The court first received a statement made by Delay to an F. B. I. agent concerning the Royal Bank of Canada and Belcher against all defendants (Tr. 2999-3009) but later instructed the jury that such statements should only be considered as evidence against the declarant (Tr. 3079-3081).

was only after the jury announced that it had arrived at a verdict on some counts that petitioners expressed interest in Delay's testimony and sought to reopen the case. Petitioners are thus in no better position to complain than if Delay's case had been heard separately and they had sought to reopen their defense on the ground that his testimony constituted newly discovered evidence. Their request rested within the sound discretion of the court. In view especially of petitioners' lack of reasonable diligence, there was no abuse of discretion. See *United States* v. *Bayer*, 331 U. S. 532, 537-539.

2. The court of appeals reversed the conspiracy convictions, finding that there was neither evidence showing a single over-all conspiracy nor evidence showing that Dalgliesh or Pratt knew of the existence of such a conspiracy. Relying on *Schaffer* v. *United States*, 362 U. S. 511, it then rejected the theory that the failure of the conspiracy count in itself caused a misjoinder of substantive counts. Pointing to no particular prejudice, petitioners Dalgliesh and Pratt request that this Court reconsider *Schaffer* and establish an absolute rule of error *ab initio* whenever a conspiracy count ultimately fails.

We see no occasion for the Court to reexamine *Schaffer* in this case. The conspiracy charge brought against petitioners was not the result of any "loose practice." *Id.* at p. 524 (dissenting opinion). Fer-

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Fernandez apparently does not complain of the joinder of defendants, since he was involved in each of the substantive counts.

nandez and his related timber transactions reasonably appeared to be the nexus creating one single over-all scheme. The appearance of Delay in fraudulent transactions both in the early and late stages of the conspiracy charged lent support to this conclusion. To be sure, Dalgliesh and Pratt were not participants in every one of the frauds involved, but a conspirator need not be involved in every part of a conspiracy and need not know the part that other conspirators have or will play. There was therefore justification to conclude that Dalgliesh and Pratt had a rôle in an over-all scheme and to charge them as conspirators. Indeed, even while reversing the conspiracy convictions, the court of appeals stated that the evidence might establish "several diverse conspiracies radiating from Fernandez, in all of which he participated, and in one or two of which Dalgliesh and Pratt participated." (Pet. App. 12). Thus, joinder may have been proper here even in the absence of the conspiracy count, since Rule 8 permits a joinder of defendants when the offenses arise out of "the same series of acts or transactions constituting an offense or offenses."

The joinder here caused no particular prejudice to Dalgliesh and Pratt. As the court of appeals found, "the evidence as to each was not particularly complex and was sufficiently compartmentalized so that the jury would have no unusual difficulty in keeping the evidence as to each separate in their own thinking. The best indication of this is that the jury did not indiscriminately convict all defendants on all counts on

which they were charged, but acquitted on counts where the evidence was weak." (Pet. App. 13)*

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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* Fernandez was found not guilty on count 1 and although Fernandez and Dual were found guilty on count 5, Dalgliesh was found not guilty on that count.

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